The controversial intellectual giant of our time: a note on the late Justice Antonin Scalia

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Abstract: While the late Justice Antonin Scalia is best known for his colourful, intemperate dissents, not everyone is aware of his broader significance as a jurist and legal scholar. As well as being successful at the bar and bench, Scalia adopted an approach to statutory and constitutional interpretation called textualism which proved highly influential, and which inspired an enormous quantity of scholarly writing. He claimed that his approach to adjudication was value neutral, however his well-known connections to the Republican party made him a target for accusations of political bias. His concurring opinions in several landmark Supreme Court judgments added fuel to the controversy by providing outcomes which advanced policies generally regarded as favourable to those on the right of the political spectrum. The controversy tends to overshadow the enormous impact that Scalia's jurisprudence has had on the legal community. He inspired the development of legal thought on both sides of the political divide, and he drew scholars from a variety of academic disciplines into the dialogue. In light of the enormous body of literature he inspired, and his political, legal and social impact, Scalia deserves to be regarded as one of the great common law jurists of the Anglo-American tradition, along side historical figures such as Denning and Pound.

Keywords: Scalia, jurisprudence, legal scholarship, textualism, originalism.

By the time of his passing, Justice Scalia had a well-deserved reputation for scathing dissents. Unlike other judges at the Supreme Court of the United States, he was bombastic rather than diplomatic when he disagreed with his fellow judges, to the shock and fascination of onlookers in America and beyond. His intemperate comments achieved such notoriety that they spawned a sub-genre of literature based on the reproduction of his more memorable statements in books and magazine articles.[1] It would be easy to characterise him as a sore loser who lashed out in fits of rage after failing to convince a majority on the bench to side with him in countless cases over his thirty-year tenure at the Supreme Court, yet it would be a significant misunderstanding to regard Justice Scalia in this way. He penned several significant majority opinions, and joined in many others. When Justice Thomas was appointed to the bench in 1991, there were four peers with whom he often agreed, and together they made a significant impact on the Court. Meanwhile, his principle-based approach to judging and the interpretation of legal texts inspired a massive quantity of scholarly analysis. While his sharp words and exuberant personality helped to keep him in the spotlight, there was substance to back it up. As a result, he leaves an intellectual legacy in his wake that rivals all but the most important legal scholars of the Anglo-American tradition like Denning

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1 See, for example, Ring (2004) and Weizer (2004).

and Pound.

Antonin Scalia was a formidable legal scholar in his own right. He attended Harvard Law School on scholarship as a Sheldon Fellow, during which time he was a notes editor for the Harvard Law Review. He graduated magna cum laude in 1960. He worked at a law firm for six years when, to the surprise of his colleagues at the firm, he left private practice to teach law at the University of Virginia right when he was about to become a partner. After four years of teaching, he went on leave from the University to serve under the administration of President Nixon in 1971 as general counsel for the Office of Telecommunications Policy. By 1974 he had become a full-time government lawyer, serving as Assistant Attorney General for the Office of Legal Counsel from 1974 to 1977.[2] In 1977 Scalia returned to academia as professor of law at the University of Chicago, where he taught until he was appointed to the US Court of Appeals for the District of Columbia Circuit in 1982. He was appointed to the Supreme Court in 1986.[3] This is an exemplary career trajectory by every measure. He moved from success to success. Furthermore, Scalia was one of those rare people who could excel as a lawyer, both in private practice and within government, as well as in academia and on the bench.

Scalia's list of publications is equally impressive. It includes at least 38 journal articles, 2 book chapters and 3 co-authored articles, on subjects ranging from procedure, sovereign immunity, competition law, administrative law and of course, constitutional and statutory interpretation.[4] In addition, he co-authored two books with Bryan Garner and published at least 20 case notes, book reviews and commentaries. This was the result of a steady output from 1969 through to the time of his passing, and it is a reflection of Scalia's commitment to legal research. Despite what must have been a very busy work schedule, he always found time to write.

Scalia was also committed to teaching. As a professor, Scalia lectured on a remarkable array of topics including conflict of law, comparative law, contracts, constitutional law, commercial transactions, administrative law and problems in US communication policy. While on the bench, he visited law schools regularly to deliver speeches, and he often taught summer courses. Had he lived, he would have taught a course on constitutional law for the Thomas Jefferson School of Law's study abroad program for the fifth consecutive year.[5] Prior to that he had taught a summer course on separation of powers at Duke University's Duke Geneva Institute in Transnational Law.[6] Scalia was also instrumental in the creation of the Journal of Law and Politics, a student-run law journal at the University of Virginia founded in 1983. His commitment to legal education was as strong as his

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2 According to the Office of Legal Counsel website, "the Assistant Attorney General in charge of the Office of Legal Counsel provides authoritative legal advice to the President and all the Executive Branch agencies. The Office drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the Executive Branch, and offices within the Department. Such requests typically deal with legal issues of particular complexity and importance or about which two or more agencies are in disagreement. The Office also is responsible for providing legal advice to the Executive Branch on all constitutional questions and reviewing pending legislation for constitutionality." <http://www.justice.gov/olc> Accessed 17 February 2016.

3 Biskupic (2009).

4 See for example Scalia (1972), (1970), (1989), (1986) and (2007).

5 Stone (2016). Available at http://timesofsandiego.com/education/2016/01/20/local-law-schools-prize-catch-local-law-schools-class/ (accessed 17 February 2016).

6 "Duke's 2011 Summer Institutes Boast Global Faculty" (*Duke Law News,* 8 March 2011) <https://law.duke.edu/news/duke-s-2011-summer-institutes-boast-global-faculty-hot-topics/> accessed 17 February 2016.

commitment to scholarship.

When considering the substance of Scalia's intellectual legacy, political issues tend to become the focal point. Scalia's Republican connections were widely known. He was friends with people like Dick Cheyney and Donald Rumsfeld. He helped to fund and promote the Federalist Society, an organisation which describes itself as

> a group of conservatives and libertarians interested in the current state of the legal order. It is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.[7]

Despite his Republican affiliation, Scalia proclaimed to the bitter end that his approach to adjudication was apolitical, and this is perhaps the most interesting feature of his jurisprudence.

He was best known, academically, for his doctrine of statutory and constitutional interpretation called textualism.[8] While Scalia claimed that textualism is about adherence to the text of the statute, the reality is much more complex. The text is not inviolable for a textualist—the rule against absurdity is a permissible justification for textual transgressions.[9] Also, a statute is to be read as a whole, in harmony with the relevant case law and neighbouring areas of law. This larger context, which excludes such items as committee reports and floor debates, can be used to justify strained interpretations of the text.[10]

In his opinions, Scalia was comfortable relying on many of the common law presumptions and canons of interpretations that can be found in the typical treatise on statutory interpretation.[11] He was also fond of dictionaries in general, and Webster's Dictionary in particular.[12] In his opinions, his reasons were always expressed clearly, and supported with multiple arguments based on traditional modes of legal reasoning, passages from historical judgments and secondary literature. He also made exceptions to his rules. The author of an empirical study of his dissents reported that he relied on legislative history in 9% of his opinions.[13] What textualism is, and is not, is a topic of intense debate and disagreement.[14] Anyone who seeks an uncontroversial definition of this doctrine will be disappointed.

Despite the indeterminacies, textualism did gain some traction at the US federal courts. Easterbrook and Thomas JJ became adherents. While textualism was not adopted by the majority of judges at the Supreme Court, it was highly influential, and brought about a measurable change in the composition

7 Http://www.fed-soc.org/aboutus/ (accessed 17 February 2016).

8 This term was first used to describe Scalia's jurisprudence by Eskridge in Eskridge (1990). Scalia embraced the label and wrote extensively about his doctrine. See for example Scalia in Scalia and Gutmann (1997); also see Scalia and Garner (2012).

9 *Ibid*. at 234-39. Scalia relied on the absurdity doctrine in *Green v Bock Laundry Machine Co* 490 US 504 at 527-28 (1989); *K Mart Corp v Cartier Inc* 486 US 281 at 324 (1988); and *INS v Cardoza-Fonseca* 480 US 421 at 452 (1987).

10 Scalia and Garner, above n. 8 at 167-69 and 252-55. Also see Scalia, above n. 8.

11 Scalia & Garner, above n. 8 195-220. See for example *Babbitt, Secretary of the Interior v Sweet Home Chapter of Communities for a Great Oregon* 515 US 687 at 720-21 (1995).

12 Mouritsen (2010); Thumma and Kirchmeier (1999); Randolph (1994); and Stewart (1993).

13 McGowan (2008) at 170. To be fair, Scalia has cited legislative history to refute the reasoning of opinions that rely on such material, but this is not always the case. See, for example, *Green v Bock Laundry Machine,* above n. 9.

14 Eskridge (1998); Cooper (1999); Calabresi and Lawson (2007); Davis (2006); Durden (2011); Durden (2013); Durden (2010); Eisenberg (1995); Fruehwald (2000); Goldstein (2000); Eskridge (2006); and Mahoney (2007).

of the arguments that appeared in the judgements of the Supreme Court.[15]

Throughout his career, Scalia insisted that a judge should not be concerned with his or her own policy preferences when interpreting a statute or constitution. Instead, a judge should consider the language used, in light of the understanding one would reasonably attribute to that language at the time at which the particular provision was enacted. By interpreting in this manner, Scalia claimed that the opportunity to decide cases based on personal policy preferences was greatly diminished.[16]

Scalia has been widely criticised for not practising what he preaches, with respect to almost every element of his jurisprudence, including his claim of apolitical interpretation. The influence of his political leanings on his judgements has been analysed doctrinally and studied empirically at great length.[17] The results have been mixed.

In part, this can be attributed to the fact that, as with all intelligent people, Scalia's values do not line up precisely with what the general public might regard as the typical conservative view. Scalia was committed to a number of values that judges and lawyers share, but would tend to be viewed as 'liberal' in popular parlance. When reading any statute, he claimed to apply neither a broad nor a narrow reading, but a reading which encompasses all that the text fairly includes.[18] In the criminal context, this tended to be harmonious with the principle of lenity—that ambiguities should be resolved in favour of the accused. For example, In *Smith v US* the defendant attempted to trade a gun for cocaine.[19] The relevant sentencing provision required a significantly longer sentence when the defendant 'uses … a firearm' when committing a 'drug trafficking crime'.[20] In his dissent, Scalia argued that the longer sentence should not be applied because the defendant did not use a firearm as a weapon but as an item for barter, and therefore his conduct was not caught by the statutory language.

As a result of his values, Scalia could claim to have some 'liberal' views. However, there is another way of looking at it. According to Zlotnick, Scalia's disdain of judicial authority trumped his desire for formal rule-following when he set out to clarify federal double-jeopardy rules in *United States v Dixon*.[21] The details of this case are too complex to summarise here, however, Zlotick's point is salient: it would be accurate to regard Scalia as a judge who had deep commitments to particular values that relate to judicial practice, and these values were not always harmonious with each other. In *Green v. Bock Laundry Machine Co*, the plain meaning of Federal Rule of Evidence 609(a)(1) meant that the admission of evidence of prior criminal conduct to impeach the testimony of a civil defendant was subject to the balancing of probative value against the prejudicial effect, while a civil plaintiff had no such safeguard. Scalia invoked the rule against absurdity to justify applying the same balancing requirement to both parties. It can fairly be said that, for Scalia, the value of procedural fairness outweighed the value of following the text in this case.

There were other matters about which Scalia was quite consistent. He propounded strong views about abortion, gay marriage, gun control and affirmative action, and with these issues, he had been

15 Koby (1999); and Brudney and Ditslear (2005).
16 Scalia, above n. 8; and Scalia & Garner, above n. 8.
17 Lawson (2003); Segal et al (1995); Segal and Cover (1989); Segal and Spaeth (2002); Harvey and Woodruff (2013); Posner (2008).
18 Scalia, above n. 8 at 23-24; Scalia & Garner, above n. 8 at 16 and 355-58.
19 508 US 223 (1993).
20 18 U S C § 924(c)(I).
21 509 US 688 (1993); Zlotnick (1999).

accused of forwarding a 'right wing' agenda in his judicial opinions. One might be compelled to argue that he was masquerading policy preferences behind an apolitical approach to interpretation. Yet, this is not a simple claim to defend. He insisted that the US Constitution should be given the meaning that a reasonable person would have understood it to mean at the time of enactment.[22] Thus, the equal protection clause, which holds that no State shall deny 'to any person within its jurisdiction the equal protection of the laws', must be understood as it would have been in 1868 when women could not vote and married women could not hold property. As a result, the modern understanding of sexual discrimination was not enshrined in the Constitution. He was steadfast in his insistence that, until the Constitution was amended, the court is bound by its original meaning.

This does not mean that Scalia believed women should be discriminated against. The result of Scalia's belief, or perhaps the core of it, was that the US Constitution is limited. It is up to democratic institutions following constitutionally prescribed processes to make the laws that bind the citizens. It was not up to unelected judges to find hitherto unknown social values in the Constitution and thereby remove the possibility of laws governing those matters through ordinary legislation. This was his stance with regard to abortion, gay marriage, and many of the other issues which upset commentators from the 'left' of the political spectrum. The Constitution did not preclude laws that restricted or prohibited these activities, from his point of view. There were critics who disagreed.[23] Indeed, there were many. There were also supporters.[24]

Of course, Scalia did find substance in many parts of the Constitution, including the equal protection clause. In his view, this clause rendered affirmative action legislation ultra vires. In *City of Richmond v J A Cronson*,[25] the court struck down legislation requiring 30% of construction contracts to be awarded to 'Minority Business Enterprises'.[26] In his concurring opinion he asserted that reverse discrimination is discrimination. The law, in his view, had to be colourblind, no matter the social consequences.

Scalia also found substance in the Second Amendment right to keep and bear arms. In *District of Columbia v Heller*,[27] Scalia wrote the majority opinion for the court, which held that all Americans had the right to possess firearms for non-military purposes like personal protection. The state could not enact laws requiring the weapons to be stored unloaded or locked up. His reasoning was based on the text of the provision and history. The amendment states that '[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.' The wording implies that there was a preexisting right to bear arms that is protected from infringement by the amendment. Based upon that implication and a reliance upon historical judgements, historical legislation, historical secondary works and historical dictionaries, Scalia concluded that this was a general right to possess firearms that was not confined to military purposes.[28]

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22 See for example Scalia, Common-Law Courts (n 8) at 37-47; and Scalia (1988).

23 See for example Kannar (1990); Post and Siegel (2006); Siegel (2008); Nichol (1999); Fleming (2007); and Barnett (2006).

24 See for example Fox and McAllister (1996); and Strang (2011).

25 488 US 469 (1989).

26 Ordinance No. 83-69-59, codified in Richmond, Va, City Code, § 12-156(a) (1985).

27 554 US 570 (2008).

28 With respect to the argument that this amendment only protected the right to historical weapons existing at the time of the amendment, he stated that "[w]e do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, e.g., *Reno v. American Civil Liberties Union*, 521 U. S. 844, 849 (1997),

The Heller decision overturned the previous precedent, *US v Miller*, which held that the amendment only protected the right to weapons that had a 'reasonable relationship to the preservation or efficiency of a well regulated militia.'[29] While Scalia valued stare decisis with respect to common law issues, he did not when it came to the Constitution. In this sense, he was an activist judge.

In a concurring opinion in *Citizens United v Federal Elections Commissioner*,[30] Scalia found the first amendment right to freedom of speech to be broad enough to permit corporations and associations of all types to be entitled to political speech, regardless of their funding source. This decision has had significant repercussions for how elections operate in the US because it enabled the entities known as 'super pacs,' which are exempt from campaign finance restrictions, to amass enormous war-chests from private donors and to deploy these funds in support of presidential, senatorial and congressional candidates. As a result, critics have argued that wealth has corrupted the American political system and eroded democracy. Given the political context, one could question Scalia's vision of democracy. However, he had a reasonable reply: it is not about his vision of democracy. It is about the Constitution and what it fairly contains. If you do not like it, petition the law-makers.

Of all the judgments that raised concerns about Scalia's politics, the most controversial was the infamous *Bush v Gore* case.[31] When the presidential ballots for the 2000 presidential election were counted in Florida, Al Gore had approximately 200 less ballots than George W. Bush, and the law required a recount if the difference was less than 0.5%. An automated recount verified Bush as the victor, and this result was certified, however there were irregularities that raised concern in certain counties. On appeal, the Florida Supreme court ordered a state-wide manual recount of ballots which required different standards in different counties, and the Bush team took the matter to the Supreme Court, seeking to have the order quashed. If the order was quashed, Bush would be the president of the United States. The judges put forth a complex set of opinions which resulted in a victory for Bush. With the exception of Justice Souter, every judge sided with their party of appointment. Having sided with Democrat appointees over time, Souter had become a liberal judge, and thus commentators regarded the decision as falling entirely within the ideological predilections of the judges. Justice Scalia joined the concurring opinion of Chief Justice Rehnquist, who found, among other things, that the Florida Supreme Court's interpretation of the relevant legislation governing elections in Florida was contrary to the intent of the legislature.[32] This raised many eyebrows. As Balkin noted:

> The same five conservative Justices who formed the majority in *Bush v. Gore* had been engaged, for over a decade, in a veritable revolution in constitutional doctrines concerning civil rights and federalism. In those decisions, the five conservatives had been promoting a relatively consistent set of ideological positions like colorblindness, respect for state autonomy from federal interference, and protection of state governmental processes from federal supervision. But the decision in *Bush v. Gore* did

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and the Fourth Amendment applies to modern forms of search, e.g., *Kyllo v. United State*s, 533 U. S. 27, 35–36 (2001), the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Ibid*. at 582.

29 307 US 174, 178 (1939). Also see Ehrman and Henigan (1989).

30 558 US 310 (2010).

31 531 US 98 (2000).

32 *Ibid*. at 118: "the court's interpretation of "legal vote," and hence its decision to order a contest-period recount, plainly departed from the legislative scheme."

not seem to further those values.

Again, there were numerous critics, and supporters.[33] It is quite revealing that the critics could not simply draw on formal legal criteria, but instead, were compelled to delve into values.

While Scalia could claim to have supported "liberal" notions, and thus came to the bench without a clear ideological leaning, his record leaves room for doubt. On matters concerning affirmative action, gun control, and gay marriage, he was consistent. There is evidence to justify the claim that, with issues that extend beyond due process, Scalia's opinions facilitated outcomes that aligned with his ideological leanings. This is not to claim that he consciously did so through disingenuous interpretation. His jurisprudence, by its very nature, would permit (but not necessarily require) outcomes of a conservative nature, given his insistence upon applying historical values to the Constitution. This would naturally permit legislation in harmony with conservative values like the belief that abortion and homosexuality are immoral. He had a credible response to the accusation of bias. Furthermore, his undeniable passion suggests he was earnest rather than cynical.

The controversy arising from the political aspects of his jurisprudence tends to overshadow the value of Scalia's scholarly contributions to the legal community. It should be kept in mind that his judicial opinions and the values he insisted upon forced lawyers and legal scholars alike to consider their positions with respect to his, and the scholarly dialogue he inspired brought about developments in countless areas of law. Participants in the dialogue included the greatest legal scholars of the day, like Dworkin and Posner.[34] His ideas invited intensive discussion among legal philosophers such as Eskridge and Manning, and also the linguists of the legal community, for example, Solan and Marmor.[35] His ideas also brought scholars from other disciplines into the dialogue, including scholars of literary theory, linguistics, philosophy, psychology, economics, political science, sociology and theology.[36] Scalia's intellectual legacy is enviable. To provide a crude quantitative indicator of the extent of his contribution to legal scholarship, a keyword search for "Scalia" in the Hein-Online database yields more than 68,000 items.[37]

Scalia's intemperate dissents contributed greatly to this legacy of scholarship, and this was likely intentional on his part. As a matter of tradition, judges have tended to be more diplomatic, and, according to some scholars, have compromised in a complex dance of give-and-take in order to obtain the concurrence of a majority. Scalia was less willing to engage with his peers in this way. Instead, he spoke out in his opinions in a manner that did not earn him support on the bench, but did catch the attention of the press and the legal community.

No doubt, the controversy aroused by his lack of collegiality made Scalia more influential, but it was much more than bluster. His opinions followed credible lines of legal reasoning that challenged those with whom he disagreed, and the strength of his legal reasoning ability was borne out by his truly remarkable career. He was successful at the academy and on the bench, and rose to the top

33 See, for example, Balkin (2001); Chemnennsky (2000-01); Goldman (2002); Kritzer (2001-02); Nicholson and Howard (2003); Klarman (2001); McConnell (2001); and Lund (2001-02).

34 Dworkin (1996-97); Posner (2012).

35 Eskridge, above n. 8; Eskridge, above n. 11; Manning (1997); Manning (2010); Solan (2004); Solan (2009); Marmor (2004).

36 Garcia (2003); Greenberg (2011); Zywicki and Sanders (2007-08); Brisbin (1997); Stoll (2015); Brandwein (1999); Winter (2001); and Philipse (2007).

37 To provide some perspective on this, a search for "Cardozo" yielded 88,000 items, but the Cardozo Law Review provided a significant quantity of false positives. A search for "Learned Hand" yielded 32,000 items.

positions in each field. He used these various positions as platforms to advance his beliefs and values. Yet, in so doing, he always found time to educate the young. Furthermore, he inspired lawyers and legal scholars to develop arguments on all sides of the issues he addressed, and thus brought advances in the field of statutory interpretation, constitutional law, administrative law, the meaning of rights, the role of the judiciary and so much more. Whatever ones thoughts are concerning the man's political impact on contemporary America, it is undeniable that his contribution to legal thought is immense, and its significances extends far beyond the borders of the United States. Scalia was truly an intellectual giant. He will rightfully take his place in history beside the greatest jurists of the Anglo-American legal tradition.

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